4

(2)

No. 08-919

IN THE

Supreme Court of the United States

JAMES L. ANDROS, III,

Petitioner,

v.

SGT. BRUCE K. DESHIELDS, LT. ELADIO ORTIZ, JEFFREY S. BLITZ, ESQ., MURRAY A. TALASNIK, ESQ., STATE OF NEW JERSEY, AND CPT. CHRISTOPHER WELLMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

BENJAMIN CLARKE
Counsel of Record
THOMAS A. ABBATE
DECOTIIS, FITZPATRICK, COLE
& WISLER, LLP
Glenpointe Centre West, Suite 31
500 Frank W. Burr Blvd.
Teaneck, New Jersey 07666
201-928-1100

Counsel for Respondents

221852

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether an unpublished, non-precedential decision of the United States Court of Appeals for the Third Circuit, holding, on unique facts, that probable cause existed to support the filing of criminal charges against petitioner, presents grounds for issuance of a writ of certiorari?

2. Whether the Third Circuit's holding, in an unpublished, non-precedential decision, that qualified immunity protects respondents because reasonable law enforcement officers could have believed that probable cause existed to support the filing of criminal charges against petitioner, presents grounds for issuance of a writ of certiorari?

TABLE OF CONTENTS

Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Cited Authorities

Cited Authorities

STATEMENT OF THE CASE

I. *The State Criminal Proceedings*

In the early morning hours of March 31, 2001, petitioner James L. Andros III ("Andros") returned to his marital home and discovered his wife Ellen slumped at her computer. Unable to get a response from her, he called 911. The emergency response team determined Ellen was dead and called in the Medical Examiner and the Atlantic County Prosecutor's Office ("ACPO"). After inspecting the death scene and performing an autopsy, the Medical Examiner, Dr. Elliot M. Gross, pronounced Ellen's death a homicide, caused by "asphyxia due to suffocation."

For the next three weeks, the ACPO performed a homicide investigation. The investigation yielded evidence that Ellen Andros had a new romantic interest, was preparing to leave her husband, and that Andros had a long history of abusive conduct toward her. The ACPO sought a warrant for Andros' arrest from a judge of the Superior Court of New Jersey on April 23, 2001. The court found probable cause to exist, and issued the warrant. The matter was thereafter presented to a grand jury, which handed up an indictment charging Andros with one count of murder on June 5, 2001. A second judge of the Superior Court of New Jersey subsequently reviewed the grand jury proceedings and upheld the indictment in a decision dated September 7, 2001.

In late 2002, the ACPO engaged an independent forensic pathologist, Dr. Donald Jason, to review the

medical evidence and the findings of Dr. Gross. Dr. Jason, in reviewing the sectional slides of Ellen Andros' coronary artery, concluded that she had died of a spontaneously dissecting coronary artery, an extremely rare natural cause of death, not of asphyxiation. The next day, December 4, 2002, the ACPO sought and obtained an order dismissing the charge.

II. *The Proceedings Below*

Andros filed suit below on April 22, 2003, naming nine defendants. Four of the defendants – Dr. Gross, Dr. Hydow Park, nurse Barbara Fenton, and the County of Atlantic (the "County Examiner defendants") – were associated with the Medical Examiner's Office, and were alleged to have been responsible for the Medical Examiner's erroneous homicide finding. Respondents, the other six defendants – Prosecutor Jeffrey Blitz, First Assistant Prosecutor Murray Talasnik, Capt. Christopher Wellman, Lt. Eladio Ortiz, Sgt. Bruce DeShields and the State of New Jersey – were associated with the ACPO, and were alleged to have mischarged Andros with homicide[1].

Respondents asserted they were immune from suit, and moved for summary judgment. By opinion dated February 23, 2004, the District Court (Hon. Jerome B. Simandle, U.S.D.J.) found that the charges against petitioner were supported by probable cause, and granted partial summary judgment in favor of

---

[1] Capt. Christopher Wellman was not initially a defendant but was named later in a separate complaint which was thereafter consolidated with the original matter.

respondents as to petitioner's federal claims. (Pet. App. 14). Respondents thereafter moved for summary judgment on the remaining state law claims, and Andros cross-moved for reconsideration. By decision dated December 21, 2005, the District Court granted the prosecutorial defendants' motion for summary judgment as to the remaining claims, and denied Andros' motion for reconsideration. (Pet. App. 90).

In March 2007, petitioner reached a $2.3 million settlement of his claims against the County Examiner defendants, and then appealed the District Court's decision granting summary judgment to respondents to the United States Court of Appeals for the Third Circuit. (Br. App. 1a). Petitioner restricted his arguments before the Court of Appeals to two contentions: that the District Court erred in determining that probable cause existed (and that respondents were therefore entitled to qualified immunity from suit on certain claims), and in dismissing petitioner's claims for familial interference. On September 22, 2008, the Court of Appeals affirmed the decision of the District Court in an unpublished and non-precedential opinion. *See* Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Chapter 5 (2002); (Pet. App. 1). Petitioner then sought panel and en banc rehearing, which were denied by order dated October 20, 2008. (Pet. App. 126). This petition for a writ of certiorari followed.

III. *Events Surrounding Ellen Andros' Death*

After leaving work on March 30, 2001, Andros, an Atlantic City police officer, went to a bar in Brigantine known as the Beach Bar. He met his father there, and stayed from 9:00 p.m. until close to closing time. He arrived home to discover his wife unresponsive at her computer terminal, and, at 4:27 a.m., called 911. EMTs and law enforcement officers arrived soon thereafter, and Ellen was pronounced dead. There were no signs of forced entry into the house, the door and windows were intact and a key was required for entry. No signs of a struggle were evident, and Ellen's two young children were found sleeping in the room where she was discovered dead.

The police sought to question Andros, who was in a state of intoxication as well as emotional turmoil. Andros responded to inquiries about whether he was drunk by saying "he had just returned from the Beach Bar in Brigantine following a long night of drinking," and confirming that he was "fucked-up." Andros asked one of the police officers, "to accept custody of his off-duty firearm," and, as he did so, "stated that he was turning over the handgun to prevent him from hurting himself and leaving his daughters all alone." When the local police inquired about his service weapon, Andros told them "it was close," but "not to worry about that gun . . . Mr. Andros stated, 'Atlantic City can come get their gun their fuckin' selves'." The local police suggested to Andros that he contact other family members. His response was, "[W]hat the fuck for? What the fuck can they do, why don't you call your own fucking family." The first responding officer noted "Most of the

conversation that we had with Mr. Andros had the same outcome." The police also observed an unusual encounter between Ellen's mother and Andros. Upon the mother's arrival at the house, on first encountering Andros, she "asked [Andros] directly, 'Did you kill her?'"

The local authorities contacted the County Medical Examiner and the ACPO. Dr. Elliot Gross, the Medical Examiner, arrived at the house shortly after 9:00 a.m. Dr. Gross' Scene Investigation Report noted, with respect to Ellen's body, that the "nose and promontory of the chin both have a blanched appearance"; that "on the left side of the neck is a patterned impression"; that "at the level of the cricoid cartilage is a . . . heart-like pattern . . . just below the edge of the collar." The report stated, "The body is warm and has a distinct posterior lividity at 9:50 a.m. Rigor mortis is not evident." Later that morning, Dr. Gross performed an autopsy on Ellen's body. The autopsy report noted the presence of "fine petechial hemorrhages" on the forehead, eyelids, right cheek, and conjunctivae, and concluded that Ellen's death was a homicide, caused by "asphyxia due to suffocation."

IV. *The ACPO's Investigation*

As a result of the Medical Examiner's homicide finding, the ACPO opened a criminal investigation. Andros was interviewed and he advised the ACPO investigators that he had spent the evening and early morning hours at the Beach Bar, arrived home to find his wife slumped and unresponsive at her computer, attempted to revive her, and then called 911. Over the next three weeks, the ACPO also interviewed Ellen

Andros' friends and family members, the owner, staff and customers of the Beach Bar, and the first responders. It also contacted Ellen Andros' internet service provider to obtain a log of her internet activity.

According to all of Ellen's friends and family, her marriage was a very unhappy one almost from the outset, and Andros was an abusive, manipulative husband and father. Highly consistent accounts were received of instances where Andros had mistreated Ellen and their two children, especially when under the influence of alcohol. The mistreatment was usually verbal or psychological, but sometimes physical and often threatening. Numerous sources told the ACPO that Andros and Ellen slept in different parts of the house; that she was involved with another man, Calvin Gadd; and that she had "talked about leaving Jim for quite some time," but "was afraid to leave Jim because he would always tell her he would get custody of the girls." On two prior occasions, the couple had separated.

Mary Ann Bakogiannis, a friend of Ellen's, recounted numerous instances of violent, erratic behavior by Andros while drunk, including threats against Ellen. According to Ms. Bakogiannis, Ellen told her of an episode in which Andros pointed his gun at her, and said, "Bang," with a "dead serious" face; Ms. Bakogiannis said, after hearing that account, "I told her that I thought Jim was dangerous and that she should get out of there before he killed her." Ms. Bakogiannis also chronicled a wide range of loutish, brutish behavior by Andros, including: abuse of a pet dog; taunting of his children; physical confrontations, threats and use of force (intended and unintended) against family

members, especially Ellen; and violent and bizarre behavior when drunk.

In the circumstances of this case, however, one sworn assertion in Ms. Bakogiannis' statement stands out from the others. Ms. Bakogiannis told the ACPO that Andros had once placed his hand and nose over Ellen's mouth while engaged in sexual intercourse, so that she could not breathe. Ellen had described to Ms. Bakogiannis that Andros had a "dead stare" while engaging in this suffocating gesture, and that she had been scared of him. Calvin Gadd, Ellen's boyfriend, also told of threats and violence against her by Andros, including instances of gun play, physical abuse and forced sexual intercourse. Andros also reportedly told Ellen that he could easily kill her and make it look like an accident.

As the ACPO was gathering this information about Andros' marital relations and history of abusive conduct, it was also interviewing people who had been at the Beach Bar on the night before Ellen's death, in order to test Andros' alleged alibi. Andros' father, in his interview, confirmed that he and his son had spent the night drinking together, but his rough time estimates were offered through a haze of alcohol impaired recollection: Andros' father was so inebriated when he left the bar that he passed out in his parked truck. Similarly, the other "Beach Bar" interviewees also placed Andros at the bar that night for an extended period of time, but no one claimed to have watched him like a hawk, and estimates on his time of arrival and departure varied widely. Thus, the interviews failed to establish a precise or near-exact time of departure.

Ellen's activities on the night before she died, by contrast, were relatively easy to trace, and fix in time. Ellen's parents advised that she had visited with her two daughters that night, and eaten a late dinner around 10:00 p.m. After returning home, she called her mother at around 12:30 a.m., and sent an e-mail to a friend at 1:48 a.m. According to Ellen's internet service provider, she affirmatively logged off her dial-up internet connection at 2:28 a.m.

On April 10, 2001, First Assistant Prosecutor Talasnik, who had been put in charge of the case, and Sgt. DeShields met with Dr. Gross to discuss his findings. During that meeting, Dr. Gross confirmed his homicide finding and, according to Dr. Gross, told Talasnik and DeShields that, based on his examination of the contents of Ellen's stomach, the time of her death would have been between two and five hours after her last meal, "and closer to two than to five." Dr. Gross recalls telling them that "4:00 would be highly unlikely" as a time of death. Respondents denied that Dr. Gross provided them with any such oral opinion. Nonetheless, for purposes of the motions below, respondents and the District Court were compelled to accept, and did accept, Dr. Gross' assertion.

Based on the information gathered during its three-week investigation, on April 23, 2001, the ACPO applied to a judge of the Superior Court of New Jersey for an arrest warrant. The court found probable cause to exist and issued the warrant.

V. *Post-Arrest History*

First Assistant Talasnik presented the matter to the grand jury on June 5, 2001. Sgt. DeShields, the lead homicide investigator, testified that the Medical Examiner had ruled Ellen's death to be a homicide, asphyxia due to suffocation; that investigation of the house yielded no evidence of forced entry; that Ellen's friends had reported that the Androses had a troubled marriage; that Ellen had been in good medical condition prior to her death; that Andros had spent the night of March 30 and early morning hours of the 31st drinking at the Beach Bar; that Andros had called 911 and, although in a visibly intoxicated and belligerent state when the authorities arrived, consistently claimed to have found his wife slumped at her computer. The grand jury found probable cause, and issued a one-count indictment charging Andros with murder.

Andros' attorneys, after reviewing the Medical Examiner's files, ACPO investigative files, and grand jury transcripts, moved for dismissal of the indictment, and contended that First Assistant Talasnik and Sgt. DeShields had made an unfair, misleading presentation to the grand jury, particularly regarding the timeline of events. In response, the ACPO acknowledged one misstatement by Sgt. DeShields – that Ellen's last e-mail was sent at "approximately 2:40 in the morning" rather than 1:48 a.m., the actual time of transmission – but argued that, on the whole, the presentation of the case was fair and satisfied all legal requirements. By decision dated September 7, 2001, a second Superior Court judge denied the motion to dismiss and upheld the indictment.

In the fall of 2002, with a trial date approaching, First Assistant Talasnik referred the case to an independent forensic pathologist the ACPO had retained as an expert witness for trial, Dr. Donald Jason. Dr. Jason, in examining slides and a preserved section of the coronary artery, saw an occlusion. On December 2, 2002, Dr. Jason advised the ACPO that Ellen had died of a spontaneously dissecting coronary artery, a rare and naturally occurring condition that has been documented only 150 times since 1931. First Assistant Talasnik, after consulting with Prosecutor Blitz, then took immediate steps to dismiss the indictment. An order of dismissal was entered on December 4, 2002. Four months later, petitioner filed suit against the County Examiner defendants and respondents by way of a 37-count complaint the alleged a variety of constitutional deprivations under 42 U.S.C. § 1983, and for tortious conduct under New Jersey common law.

VI. *The District Court's Decisions*

In response to petitioner's suit, respondents asserted that the information gathered in the course of the homicide investigation sufficed to establish probable cause, and rendered them immune from suit on grounds of absolute prosecutorial and qualified immunity. In a 76-page opinion dated February 23, 2004, the District Court upheld respondents' arguments in substantial part. (Pet. App. 14). The court found that, assessed in light of a medical ruling that Ellen Andros had been suffocated, the information obtained by the ACPO regarding Andros' marital history and past behavior established probable cause as a matter of law and, in

consequence, the criminal charges did not offend the Constitution[2].

The District Court reached this conclusion based on a thorough review of the motion record, and a painstaking marshalling of the parties' contentions. The District Court not only gave full treatment to petitioner's contention that the ACPO had manipulated or suppressed exculpatory evidence, it began its account of the homicide investigation by noting that the investigation "produced certain evidence which exculpated plaintiff" – including, specifically, evidence that "placed plaintiff at the Beach Bar . . . until 4:00 a.m. . . . while other evidence indicated that Ellen died between 2:00 and 2:30 a.m." (Pet. App. 24).

The District Court was equally thorough, however, in its review of the evidence that tended to inculpate Andros, including: the inconclusiveness of the evidence regarding his time of departure from the Beach Bar; the extemporaneous accusation of Ellen's mother upon her arrival at Andros' house; the lack of emotion shown by Andros when he was told the death had been ruled a homicide; Ellen's apparent state of good health prior to her death, and the absence of any sign of forced entry; the extensive record of marital discord and threatening

---

[2] Certain claims against respondents were voluntarily dismissed by petitioner, or were disposed of by the District Court on grounds of absolute prosecutorial, Eleventh Amendment and statutory immunity under the New Jersey Tort Claims Act, N.J.Stat.Ann. 59:3-1 *et seq.*, vague pleading, or failure of proof. (Br. App. 4a, 7a, 12a). Since petitioner no longer contests the dismissal of those claims, we omit the District Court's discussion of them here.

behavior by Andros; and the sworn assertion by Ms. Bakogiannis that Ellen had told her of a prior instance when Andros made a suffocating gesture during sex. (Pet. App. 24-29).

Squarely addressing petitioner's "assertion that defendants never had probable cause to prosecute plaintiff", the District Court found that, "viewing the evidence in the light most favorable to plaintiff, the defendants had probable cause to suspect plaintiff of the crime on April 6, 2001." The District Court noted that, by that date, the ACPO had conducted interviews of the Beach Bar witnesses, showing "no witness could testify that [Andros] was there the entire period" from 9:00 p.m. and 4:00 a.m., and providing "a wide range of arrival and departure times, with plaintiff arriving between 11:00 p.m. and 1:00 a.m. and leaving between 3:30 a.m. and 4:00 a.m." (Pet. App. 71). Thus, the ACPO knew "plaintiff's alibi was not tight." (Pet. App. 72). Viewing the available facts as a whole, the District Court concluded that the exculpatory evidence "did not eliminate the probable cause that existed." (*Id.*).

Despite the thoroughness of the District Court's decision, petitioner thereafter sought reconsideration of it, and asserted that the court had overlooked critical "time of death" evidence in the record – specifically, Dr. Gross' assertion that he had provided the ACPO with an oral opinion that Ellen died between two to five hours after her last meal, "and closer to two than to five." The District Court afforded petitioner the opportunity to depose all defendants, and to make supplemental submissions. Discovery merely confirmed what was known beforehand – *i.e.*, that Dr. Gross claimed to have

provided the ACPO with an oral opinion, undocumented anywhere in the record, that Ellen Andros died two to five hours after her last meal. In his submissions, petitioner contended that since respondents denied receiving any such opinion, a material dispute of fact existed on that issue. Respondents contended, reciprocally, that the dispute was immaterial because, even accepting Dr. Gross' testimony, probable cause still existed to support the charges.

In a 32-page opinion dated December 21, 2005, the District Court denied appellant's motion for reconsideration and reaffirmed its probable cause finding. (Pet. App. 90). The court, after reviewing the parties' supplemental submissions, observed that, "despite the considerable time available . . . to take additional discovery, the factual landscape known to the Court at the time of its February 23, 2004 Opinion has remained largely unchanged." (Pet. App. 93). Disagreeing with the argument that it had overlooked material evidence in its initial decision, the court stated that it had "considered, in depth, [the] exculpatory time of death evidence, but concluded that there still was sufficient evidence for a finding of probable cause in April 2001." (Pet. App. 100-101). After surveying the entire record, the court again concluded, "Taken together it could have been reasonably concluded that the evidence implicated plaintiff in spite of his alibi, given evidence of his expressed intent to kill her, his motive and his opportunity." (Pet. App. 106).

VII. *The Decision of the Court of Appeals*

After settling with the County Examiner defendants for $2.3 million, petitioner appealed the decision granting summary judgment to respondents to the United States Court of Appeals for the Third Circuit. (Br. App. 1a). In an unpublished and non-precedential decision dated September 22, 2008, the Court of Appeals affirmed the judgment of the District Court. (Pet. App. 1). After reciting well-established legal principles governing the existence of probable cause, the Court of Appeals agreed with the District Court's probable cause finding. Contrary to petitioner's contention that exculpatory evidence was ignored, the Court of Appeals held that respondents "need not have ignored the available alibi and time of death evidence in order to believe [petitioner] guilty. Rather, they simply gave that evidence a different construction, one that was reasonable at the time." (Pet. App. 6).

Even accepting petitioner's construction of the alibi and time of death evidence at face value, the Court of Appeals noted that the alibi evidence was not "flawless" as petitioner maintained, and even his selective reading of the evidence did not render it "logically impossible" that petitioner had returned home in time to murder his wife at 4 a.m. (Pet. App. 7-8). Weighed against respondents' "foundational beliefs" regarding the Andros family history, the Medical Examiner's homicide finding and the physical evidence at the scene, the Court of Appeals held that it was reasonable for respondents to believe that Andros had murdered his wife upon returning home around 4 a.m. Indeed, while hindsight may render that judgment flawed, "at the time it

provided the only reasonable explanation of Ellen Andros's death." (Pet. App. 8). Therefore, the District Court properly held that respondents enjoyed qualified immunity from suit, the Court of Appeals found.

REASONS FOR DENYING THE PETITION

I. *Summary of Argument*

Petitioner contends that respondents lacked probable cause to file charges against him, and that the Court of Appeals announced a new legal standard for determining probable cause in affirming the decision of the District Court. Petitioner rests these contentions on mere slivers of the record, to the exclusion of other, and more salient, portions of it. The District Court and Court of Appeals, by contrast, correctly looked at the entire record, which establishes, beyond any material dispute of fact, that the charges filed against petitioner were supported by probable cause. The Court of Appeals' decision, while unpublished and non-precedential, is legally sound and merely applies well-settled principles of law to the established facts of record. From a jurisprudential standpoint, this case is unexceptional, and presents no issue worthy of this Court's discretionary review.

The District Court and Court of Appeals both recognized that, presented with a firm medical ruling of asphyxiation by suffocation and no sign of forced entry, the question facing respondents in April 2001 was as stark as this: which was more likely – that an unidentified assailant gained entry to the Andros' home and, without burglarizing the home or disturbing the

children or leaving any trace of his visit, suffocated Ellen Andros, or that petitioner came home in a state of severe intoxication at some point in the morning hours, suffocated his wife, and thereafter called 911 in an after-the-fact exercise of remorse? A reasonable law enforcement official would find the latter scenario to be more likely than the former, and petitioner's selective citation to exculpatory evidence in the record, on balance, does not render that conclusion objectively unreasonable.

Petitioner's argument that the Court of Appeals formulated a new "possible cause" test is an exercise in simple misreading of the law. The record below established beyond any material dispute of fact that probable cause existed to support the filing of criminal charges against petitioner; it follows, *a fortiori*, that reasonable law enforcement officers could have *thought* probable cause existed. Thus, under the "objective reasonableness" test that governs qualified immunity, respondents were clearly entitled to summary judgment. *See, e.g., Orsatti v. New Jersey State Police*, 71 F.3d 480, 483 (3d Cir. 1995) (awarding summary judgment in § 1983 case where police officers' belief that they had probable cause to arrest plaintiff was objectively reasonable).

If qualified immunity does not protect law enforcement officers in a case such as this one, which presents a fact pattern that seems designed for a legal textbook, then it would fail to serve the salutary function for which it was designed. The Court of Appeals rightly applied settled law to the facts and, as reflected by the resolution of the case below, saw justice done. No cause or basis for discretionary review of the judgment exists and the petition should be denied.

II. *The Court of Appeals Properly Applied Settled Law Governing Qualified Immunity in Holding That Respondents' Belief in the Existence of Probable Cause was Objectively Reasonable*

Petitioner's central contention is that the Court of Appeals broke legal ground by announcing a new "possible cause" test for the existence of probable cause. In making this argument, petitioner places heavy emphasis on the Court of Appeals' observation that it was not "logically impossible" that petitioner had murdered his wife, and asserts that the statement reflects an undue relaxation of the standard for probable cause. A full and fair reading of the decision fails to support that conclusion, and petitioner's out-of-context spotlighting of one sentence in the decision fails to demonstrate a need or reason for review by this Court. Read as a whole, the Court of Appeals' decision represents a straightforward application of settled legal principles to a materially undisputed set of facts, to reach two thoroughly unremarkable – and ultimately correct – conclusions: (1) probable cause existed; and (2) respondents were entitled to qualified immunity from suit. *See* U.S. Sup. Ct. R. 10 (noting that the writ is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law).

The legal standard for determining probable cause is well-established, and the Court of Appeals did not deviate from it. *See Orsatti*, *supra*, 71 F.3d at 483 ("probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable

person to believe that an offense has been committed by the person to be arrested"). "The test for an arrest without probable cause is an objective one." *See Barna v. City of Perth Amboy*, 42 F.3d 809, 819 (3d Cir. 1994) (affirming the District Court's determination that plaintiff's arrest was supported by probable cause); *see also Kelley v. Myler*, 149 F.3d 641, 646 (7th Cir. 1998) ("The test, an objective one, is whether a reasonable officer would have believed the person had committed a crime"; affirming the District Court's finding of probable cause); *cf. Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) ("an arresting officer's subjective state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause").

Petitioner's attack on the Court of Appeals' qualified immunity analysis is equally without merit. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that public officials are entitled to qualified immunity from suit "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In order to determine whether a public official is entitled to qualified immunity, a reviewing court must decide if: (1) plaintiff has established a violation of a constitutional right; or (2) the constitutional right was clearly established at the time of the alleged act. If the right was not clearly established at the time of the act, the court need go no further in the analysis. *See Pearson v. Callahan*, 129 S.Ct. 808, 555 U.S. – (2009) (holding that a threshold finding that a constitutional right was not clearly established may be dispositive of the public official's entitlement to qualified immunity; abrogating *Saucier v. Katz*, 533 U.S. 194 (2001)). Immunity depends

on "the objective legal reasonableness of the action, in light of the legal rules that were clearly established at the time it was taken." *Id.*; *see also Anderson v. Creighton*, 483 U.S. 635, 639 (1987)); *cf. Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity is an immunity from suit, rather than a mere defense to liability).

Petitioner's contention that the Court of Appeals construed qualified immunity to protect "all but the most egregiously unreasonable conduct by public officials" cannot withstand a simple reading of the decision below, is an exaggeration, and an unpersuasive one at that. (Pet. at 10). After a thorough canvassing of the record, the Court of Appeals found respondents' conduct to have been objectively reasonable, and thus immunized under well-settled legal standards; there is nothing law-changing about that conclusion – rather, it is petitioner, not the court below, who misunderstands qualified immunity. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). Most importantly, this case would still fail to present any novel legal issue warranting review by this Court even if, as petitioner contends, the Court of Appeals' application of qualified immunity, in the unique facts of this case, was erroneous.

Far from establishing a new standard of probable cause or qualified immunity, the Court of Appeals properly analyzed these separate but related issues, and determined that respondents' actions were beyond legal reproach or remedy. The lower court's observation that petitioner's alibi, such as it was, did not render it

"logically impossible" for him to have murdered his wife was well-grounded in the record, and legally uncontroversial – especially in an unpublished and non-precedential decision for the parties only. The Court of Appeals recognized that law enforcement officers who make an arrest under a mistaken belief that probable cause existed may nonetheless be entitled to qualified immunity if probable cause could reasonably have been thought to exist, and in so holding committed no error. *See Gilles v. Davis*, 427 F.3d 197, 207 (3d Cir. 2007) (affirming summary judgment in favor of officers who arrested a "campus evangelist" on a disorderly persons charge; "the reasonableness of the officer's belief should be judged from [his] on-scene perspective, not with the perfect vision of hindsight"); *Orsatti, supra*, 71 F.3d at 482-83; *Cartier v. Lussier*, 955 F.2d 841, 843 (2d Cir. 1992) (immunity attaches "when reasonable officers could disagree as to whether probable cause exists"); *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990) ("In determining whether qualified immunity exists the issue is not probable cause in fact but 'arguable' probable cause . . . [A]ctual probable cause is not necessary for an arrest to be objectively reasonable"); *Donovan v. Briggs*, 250 F.Supp.2d 242 (W.D.N.Y. 2003) (prosecutor and sheriff's officer had probable cause to arrest plaintiff for alleged rape of his daughter despite exculpatory evidence in their possession, and qualified immunity would shield them from suit even in the absence of actual probable cause).

Of course, qualified immunity will always be present where, as here, the record suffices to establish probable cause as a matter of law since an arrest or prosecution supported by probable cause falls in the epicenter of

objective legal reasonableness. Such an arrest or prosecution is more than reasonable; it is constitutional by definition. Thus, where probable cause is established, a claim for false arrest or malicious prosecution will be subject to dismissal for failure of proof and on immunity grounds, both. *See, e.g., Green v. City of Paterson*, 971 F.Supp. 891, 901-02 (D.N.J. 1997) (awarding summary judgment to police officers who mistakenly but reasonably arrested the wrong person for a shooting; probable cause existed and the officers' actions were objectively reasonable).

Petitioner's argument to this Court is ultimately the same as his argument below: that no reasonable law enforcement officer could have believed he murdered his wife in the face of an oral opinion from Dr. Gross suggesting that Ellen died before 4:00 a.m., and perhaps as early as 2:00 a.m. The Court of Appeals held that respondents' belief that probable cause existed was objectively reasonable, given the Medical Examiner's ruling, and that their theory was a "reasonable explanation of Ellen Andros's death." (Pet. App. 8); *see Rogers v. Powell*, 120 F.3d 446, 454 (3d Cir. 1997) ("Whether a government official is entitled to protection under the doctrine of qualified immunity is a 'purely legal question'"); *Acierno v. Cloutier*, 40 F.3d 597, 609 (3d Cir. 1994) (same). Petitioner raises no valid ground for review of that conclusion.

III. *The Court of Appeals did not Depart From the Court's Summary Judgment Jurisprudence in Holding That no Material Dispute of Fact Existed Regarding Respondents' Entitlement to Qualified Immunity*

Unable to show that the Court of Appeals applied the wrong standard in finding probable cause, or committed any mistake of law in its qualified immunity analysis, petitioner contends that the lower courts failed to view the evidence in the light most favorable to him, and resolved disputed issues of fact against him, and thus erred in awarding respondents summary judgment. Once again, on its face, this argument fails to present a valid reason for review by this Court.

Petitioners' argument on this score misconceives, in a very fundamental way, the holding below. There was no dispute in this case as to the contents of the ACPO's files, or the nature and substance of the information gathered through its investigation. Rather, there was a dispute as to the legal import of that information: did it suffice to establish probable cause – and, if not, did it suffice to establish arguable probable cause? *See Trabal v. Wells Fargo Armored Service Corp.*, 269 F.3d 243, 249 (3d Cir. 2001) (the existence of probable cause is an issue of law where the underlying facts are undisputed); *Merkle v. Upper Dublin School District*, 211 F.3d 782, 788-89 (3d Cir. 2000) ("a district court may conclude that 'probable cause exists as a matter of law if the evidence, viewed most favorably to plaintiff, would not support a contrary factual finding,' and may enter summary judgment accordingly"); *Sharrar v. Felsing*, 128 F.3d

810, 818 (3d Cir. 1997) (the question of probable cause is for the jury only if there is sufficient evidence to support a reasonable finding that probable cause did not exist; affirming District Court's finding of probable cause on summary judgment); *Sherwood v. Mulvihill*, 113 F.3d 396, 401 (3d Cir. 1997) (same).

As noted above, both the existence of probable cause and the availability of qualified immunity are governed by objective tests. Under an objective review of the investigative record, petitioner's contention that the ACPO should have given greater consideration to certain information, such as the undocumented oral opinion of Dr. Gross and the statements of the Beach Bar witnesses, and been less influenced by, *e.g.*, the Bakogiannis certification and the statements of Ellen's parents and friends, was rightly found to present no genuine issue for trial. Indeed, the Court of Appeals noted that, far from ignoring the facts of record advanced by petitioner, respondents "simply gave that evidence a different construction, one that was reasonable at the time." (Pet. App. 6). Thus, the court below did not resolve the parties' divergent factual interpretations of the record; rather, it determined that respondents' construction of that record led to an objectively reasonable belief that petitioner had murdered his wife. Petitioner's natural disagreement with that conclusion does not mean there was an underlying dispute of fact for trial, any more than it means that the District Court erred in finding probable cause.

Evaluated against a well-documented history of marital strife, threats, and abuse, petitioner's roughly

validated assertion that he was at the Beach Bar from around 9:00 p.m. to around 4:00 a.m. would not have dissuaded reasonable law enforcement officers from believing he was the person responsible for Ellen's "asphyxia due to suffocation." The lower courts stayed well within the bounds of their proper role in so finding, and did not deviate from standard summary judgment practice under Fed.R.Civ.P. 56. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (to defeat summary judgment, a dispute must be "genuine," and sufficient to support a verdict for the non-moving party).

CONCLUSION

The decision of the Court of Appeals rests on its application of undisputed material facts to established rules of law. Petitioner's disagreement with the result presents no basis for the exercise of this Court's discretionary review, and the petition for a writ of certiorari should accordingly be denied.

Respectfully submitted,

BENJAMIN CLARKE
Counsel of Record
THOMAS A. ABBATE
DECOTIIS, FITZPATRICK, COLE
& WISLER, LLP
Glenpointe Centre West, Suite 31
500 Frank W. Burr Blvd.
Teaneck, New Jersey 07666
201-928-1100

Counsel for Respondents

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, CAMDEN VICINAGE FILED APRIL 11, 2007

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

Civil No. 03-1775(JBS)

JAMES L. ANDROS, III, individually and as Father and Guardian ad Litem on behalf of Meghan Elizabeth Andros and Elizabeth Andros, minors,

Plaintiffs,

v.

ELLIOT M. GROSS, M.D., et al.,

Defendants.

ORDER

This matter is before the Court upon the Motion for Settlement Approval filed by James L. Andros, III [Doc. No. 158]; and the parties having consented to the jurisdiction of this Court to decide the Motion; and the attorneys for the parties having reported to the Court that the claims of the minor plaintiffs, Meghan Elizabeth Andros and Elizabeth Andros, have been settled between the plaintiffs and the settling defendants, Elliot M. Gross, M.D., Hydow Park, M.D., Barbara Fenton and

County of Atlantic; and the Court having taken proofs on the record at the friendly hearing conducted on April 4, 2007; and the Court having reviewed in detail plaintiffs' submissions [Doc. No. 158], including the Affidavit of Janice A. Colton, Ph.D.; and the Court finding that the settlement of the minors' claims is fair and reasonable as to its amount and its terms; and the Court finding that the settlement adequately compensates the minors for their past, present and future losses and damages attributable to the claims against the settling defendants; and the Court finding that the minors are not settling their claims against the parties in the case whose summary judgment motions were granted; and for good cause shown

IT IS on this 11th day of April 2007 hereby

ORDERED that the settlement between plaintiffs, Meghan Elizabeth Andros and Elizabeth Andros, minors, and defendants, Elliot M. Gross, M.D., Hydow Park, M.D., Barbara Fenton and County of Atlantic, is APPROVED; and it is further

ORDERED that pursuant to the settlement, Meghan Elizabeth Andros and Elizabeth Andros shall each be allocated $25,000.00 as compensation for their losses and damages attributable to the claims against the settling defendants; and it is further

ORDERED that no attorneys' fees or costs of suit shall be deducted from the $25,000.00 allocations; and it is further

Appendix A

ORDERED that $25,000.00 on behalf of Meghan Elizabeth Andros and $25,000.00 on behalf of Elizabeth Andros shall be paid by or on behalf of defendants by separate checks made payable to the "Surrogate of Atlantic County Intermingled Account on behalf of Meghan Elizabeth Andros" and the "Surrogate of Atlantic County Intermingled Account on behalf of Elizabeth Andros"; and it is further

ORDERED that James L. Andros, III, sole parent and Guardian ad Litem, shall make application for the Surrogate of Atlantic County for the appointment of a limited guardian of the estates of the minors, limited to the amount on deposit with the surrogate. As guardian of the deposited amounts, Mr. Andros shall not be authorized to receive any funds on his behalf or on behalf of his minor children except court-directed withdrawals; and it is further

ORDERED that the allocated monies will be paid from the accounts only upon further Order of the Superior Court of New Jersey, Chancery Division, Probate Part, pursuant to N.J.S.A. 3B:15-17, or upon the minors attaining majority under N.J.S.A. 3B:15-17.1; and it is further

ORDERED that the attorney for the plaintiffs shall deliver a copy of this Order to all parties and the Surrogate of Atlantic County within five (5) days of the date hereof.

/s/ Joel Schneider
JOEL SCHNEIDER
United States Magistrate Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 21, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

HON. JEROME B. SIMANDLE

Civil No. 03-1775 (JBS)

JAMES ANDROS, III, individually and as Natural Father and Guardian of MEGHAN ELIZABETH ANDROS and ELIZABETH ANDROS, minors,

Plaintiffs,

v.

ELLIOT M. GROSS, M.D., BRUCE K. DESHIELDS, ELADIO ORTIZ, JEFFREY BLITZ, ESQUIRE, MURRAY A. TALASNIK, ESQUIRE, HYDOW PARK, M.D., BARBARA FENTON, COUNTY OF ATLANTIC, STATE OF NEW JERSEY,

Defendants.

Civil No. 04-5968

JAMES ANDROS, III, individually and as Natural Father and Guardian of MEGHAN ELIZABETH ANDROS and ELIZABETH ANDROS, minors,

Plaintiffs,

Appendix B

v.

CHRISTOPHER WELLMAN,

Defendant.

ORDER

This matter is before the Court upon the motion for partial reconsideration of the Court's February 23, 2004 Opinion and Order by Plaintiffs [Docket Item 95]; and the motion for summary judgment by Defendants Blitz, DeShields and Talasnik seeking dismissal of all remaining state law claims [Docket Item 96]; and the motion for summary judgment by Defendant Wellman [Docket Item 87]; and

The Court having considered the written submissions in support and opposition; and for the reasons stated in the Opinion of today's date;

IT IS THIS 21st day of December 2005 hereby

ORDERED that the motion for partial reconsideration of the Court's February 23, 2004 Opinion and Order by Plaintiffs [Docket Item 95] shall be, and hereby is, **DENIED**; and

IT IS FURTHER ORDERED that the motion for summary judgment by Defendants Blitz, DeShields and Talasnik seeking dismissal of all remaining state law claims [Docket Item 96] shall be, and hereby is,

GRANTED and summary judgment is entered in their favor on Counts 6, 8, 9, 10, 11, 16, 20, 24, 26, 27, 32 and 37; and

IT IS FURTHER ORDERED that the motion for summary judgment by Defendant Wellman [Docket Item 87] shall be, and hereby is, **GRANTED,** and summary judgment is entered in his favor upon all claims.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED FEBRUARY 23, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

HON. JEROME B. SIMANDLE

Civil No. 03-1775 (JBS)

JAMES ANDROS, III, individually and as Natural Father and Guardian of MEGHAN ELIZABETH ANDROS and ELIZABETH ANDROS, minors,

Plaintiffs,

v.

ELLIOT M. GROSS, M.D., BRUCE K. DESHIELDS, ELADIO ORTIZ, JEFFREY BLITZ, ESQUIRE, MURRAY A. TALASNIK, ESQUIRE, HYDOW PARK, M.D., BARBARA FENTON, COUNTY OF ATLANTIC, STATE OF NEW JERSEY,

Defendants.

ORDER

This matter having come before the Court on the motion of defendant Elliot M. Gross, M.D. to dismiss the claims against him in Counts 2, 7, 21, 28, 29, and 33 of the Complaint, [Docket Item 25-1], the motion of defendants County of Atlantic, Hydow Park, M.D., and

Barbara Fenton to dismiss the claims against them in Counts 14, 22, 30, and 31 of the Complaint, [Docket Item 28-1], and the motion of defendants Bruce DeShields, Eladio Ortiz, Jeffrey Blitz, Murray Talasnik, and State of New Jersey for summary judgment as to all claims asserted against them, [Docket Item 29-1]; and the Court having considered the parties' written submissions and having heard oral argument on November 5, 2003; for good cause and the reasons expressed in Opinion of today's date;

IT IS this **23rd** day of **February, 2004,** hereby

ORDERED that the motion of defendant Elliot M. Gross, M.D. to dismiss the claims against him in Counts 2, 7, 21, 28, 29, and 33 of the Complaint, [Docket Item 25-1], be, and hereby is, **GRANTED IN PART** as to:

- the negligence claim asserted in Count 21 and the negligent infliction of emotional distress claim asserted in Count 33, to the extent that they seek relief for Dr. Gross' misrepresentation of the cause of Ellen's death, and

- the federal family interference claims asserted in Counts 2 and 28, and

- the state family interference claims asserted in Counts 7 and 29, and

Appendix C

DENIED IN PART as to:

- the negligence claim asserted in Count 21, and the negligent infliction of emotional distress claim asserted in Count 33, to the extent that they seek relief for actions of Dr. Gross other than his misrepresentation of the cause of Ellen's death;

IT IS FURTHER ORDERED that the motion of defendants County of Atlantic, Hydow Park, M.D., and Barbara Fenton to dismiss the claims against them in Counts 14, 22, 30, and 31 of the Complaint, [Docket Item 28-1], be, and hereby is,

GRANTED IN PART as to:

- the federal family interference claim asserted in Count 30, and

- the state family interference claim asserted in Count 31, and

DENIED IN PART as to:

- the negligence claim asserted against defendant Fenton in Count 22, and

- the 42 U.S.C. §1983 claim asserted against defendant Park in Count 14;

IT IS FURTHER ORDERED that the motion of defendants Bruce DeShields, Eladio Ortiz, Jeffrey Blitz, Murray Talasnik, and State of New Jersey for summary judgment as to all claims asserted against them, [Docket Item 29-1], be, and hereby is,

GRANTED IN PART as to:

- the warrantless search claim of Count 18,
- the invasion of privacy claim of Count 19,
- all claims asserted against the State of New Jersey,
- all federal claims asserted against defendants Blitz, Talasnik, DeShields, and Ortiz,
- the state family interference claims of Counts 7 and 29, and

DENIED IN PART as to:

- the following state claims asserted against defendants Blitz, Talasnik, DeShields, and Ortiz:

  Count 6 (malicious prosecution, state constitution)

  Count 8 (malicious prosecution, common law)

Appendix C

Count 9 (defamation, state constitution)

Count 10 (conspiracy, common law)

Count 11 (aiding and abetting, common law)

Count 16 (false arrest, false imprisonment, common law)

Count 20 (invasion of privacy, false light)

Count 24 (negligence)

Count 26 (abuse of process, state constitution)

Count 27 (abuse of process, common law)

Count 32 (intentional infliction of emotional distress)

Count 37 (punitive damages);

IT IS FURTHER ORDERED that the dismissal of the family interference claims of Counts 2, 7, 28, 29, 30, and 31, and the dismissal of the supervisory liability claim of Count 15 to the extent that it relates to the family interference claims is **WITHOUT PREJUDICE** to the plaintiffs' right to replead the claims with the requisite specificity explained in the Opinion of today's date by filing an Amended Complaint to be filed within thirty (30) days of the date of this Order.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
United States District Judge

APPENDIX D — ORDER OF VOLUNTARY DISMISSAL AS TO CERTAIN CLAIMS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED NOVEMBER 6, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action
No. 03-1775 (JBS)

JAMES ANDROS, individually and on behalf of MEGHAN ELIZABETH ANDROS and ELIZABETH ANDROS, minors,

Plaintiffs,

v.

ELLIOT M. GROSS, M.D., et al.,

Defendants.

ORDER OF VOLUNTARY DISMISSAL AS TO CERTAIN CLAIMS

This matter having come before the Court at oral argument on November 5, 2003; John A. Guernsey, Esquire and Kevin D. Kent, Esquire having appeared for plaintiff James Andros, Andrew R. Duffy having appeared for plaintiffs Meghan Elizabeth Andros and Elizabeth Andros, Russell Lichtenstein, Esquire and Michael Gross, Esquire having appeared for defendant

Appendix D

Elliot M. Gross, M.D., Donna M. Taylor, Esquire having appeared for defendants County of Atlantic, Hydow Park, M.D., and Barbara Fenton, and Benjamin Clarke, Esquire having appeared for defendants State of New Jersey, Jeffrey Blitz, Murray Talasnik, Bruce DeShields, and Eladio Ortiz; and the plaintiffs having consented to the voluntary dismissal of the abuse of process claims of Counts 25, 26, and 27 as to defendant Elliot M. Gross, M.D., of the respondeat superior claim of Count 35 as to defendant County of Atlantic, and of the 42 U.S.C. § 1983 false imprisonment claim of Count 4 as to defendants DeShields, Blitz, and Talasnik;

IT IS this 6th day of November, 2003 hereby

ORDERED that Counts 25, 26, and 27 as to defendant Elliot M. Gross, M.D., be, and hereby are, **DISMISSED**; and

IT IS FURTHER ORDERED that Count 35 as to defendant County of Atlantic, be, and hereby is, **DISMISSED**; and

IT IS FURTHER ORDERED that Count 4 as to defendants DeShields, Blitz, and Talasnik, be, and hereby is, **DISMISSED**.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
United States District Judge